1952

File No. Prohibition II/52 R

Legal Dept.

B **BRANCH** P.20(E)

Subject:— Rules under the Bombay Prohibition Act 1949

Prohibition II/52 (R)

File No.

2334-13

Legal Department.

A revised draft notification is sent herewith.

2. The revised draft provides for exemption from payment of pass fee and special fee for removal in bond of rectified spirit for use in the manufacture of medicinal and toilet preparations containing alcohol. Thus all non-alcoholic products are excluded from the scope of the previso and they will continue to remain subject to payment of fee under rule ". The proposed previso to new rule 4 of the Revenue Department is, therefore, unnecessary and has been omitted from the revised draft.

Sd/- J.R.Dhuandhar

O.C. 20/2

Additional Secretary to Government.

U.R. to R.D. No. 2779, dated the 20th February 1952.

Mjr/26/6

4 Cs.

Legal Department.

The rules in question to which the amendment is proposed provide for regulating import of Indian made foreign liquor (including medicinal and toilet preparations containing spirit of Indian manufacture) into the Bombay State from other parts of India on payment of duty in the State of export (vide rule 8). The proposed amendment relates to spirituous medicinal and toilet preparations imported from Saurashtra. The question whether it would not be proper to hold that the decision of the Supreme Court regarding the possession, sale, purchase, consumption and use of medicinal and toilet preparations equally applies to the manufacture, import and export thereof has, however, been referred to the Advocate General and Shri H.M. Seervai for their Joint opinion. A copy of the statement of the case prepared for obtaining their joint opinion is sent herewith. As soon as their opinion is received, a copy of the same will be forwarded to R.D., The R.D. should then consider the proposed amendment in the light of their joint opinion and send back the file to this Department, if necessary.

Sd/- J.R.Dhurandhar

O.C. 23/2

Additional Secretary to Government.

U.R. to R.D., No. 2985, dated the 25th February 1952.

Mjr/26/6

5 Cs.

Legal Department.

Attention is invited to sections 30 and 31 of the Act under which provision is made for granting a licence for the possession of certain intoxicants when they are required to be possessed for the scientific, industrial medical or similar purpose. The Director has presumably in view cases to which neither section 30 or 31 applies and accordingly it would be necessary to exclude from the scope of the proposed rule intoxicants to which sections 30 and 31 apply. The revised draft rules sent herewith make the necessary provisions.

2. Condition 5 subject to which permit is granted provides that the permit may be suspended or cancelled at any time without assigning any reasons. Such a condition will be considered as imposing unreasonable restriction on the right to hold and dispose of property and therefore violating the fundamental right conferred on the citizen by article 19(1)(f) of the Constitution. It has, therefore, been omitted from the revised draft.

Sd/- J.R.Dhurandhar

O.C. 25/2

Additional Secretary to Government.

U.R. to R.D., No. 3077, dated the 26th February 1952.

Mjr/26/6

4 Cs.

A revised draft notification in place of R.D. draft at pp 63-69 ante is sent herewith subject to the following observations:-

(i) It is not necessary to use either the word "State" or "Special " in R.D. draft notification at p 33 ante as without the use of any of these words it is clear from the wordings of the said draft notification that the board constituted under it is a board constituted for the whole of the State of Bombay and not for any local area. The expression "State Medical Board" occurring in the R.D. draft at pp 63-69 ante has, however, been retained in the revised draft as it is necessary to distinguish the board constituted for any local area. This has been made clear by inserting the definitions of the terms "State Medical Board" and the "Area Medical Board" in the revised draft under clause (1).

(2) The procedure specified in sub-rule (1) of rule 64 now proposed to be substituted is not clear. It appears that a person has to make an application in Form F. L/A-I. The form, however, will be available from the Office of the Collector and the Superintendent of Prohibition and Excise. On receipt of such form a person desiring to possess, use and consume foreign liquor on the grounds of health has to make an application to such local Medical Board as the Director, the Collector or the Superintendent of Prohibition and Excise may direct. It is also provided in sub-rule (1)(f) that the Board is to forward the application together with the report of the medical examination etc. in the case of Greater Bombay to the Collector and in the case of other area to the Civil Surgeon of the District who is to forward it to the Collector. It is not known, therefore, at what stage and in what manner the Director, the Collector or the Superintendent of Prohibition and Excise will inform the applicant that he has to make an application to a particular Board. If the Medical Board.

constituted....

constituted for the area is declared automatically the competent authority for receiving the application form the area, the elaborate procedure specified in the rule will not be necessary. R.D., however, should consider this point in consultation with the Director of Excise and Prohibition.

3. In sub-rule (g) it is provided that the members of the Medical Board shall not be entitled to retain the fee of Re. 1/- if they are Government servants and the fee shall be credited to Government. It is presumed that, where the Medical Board consists wholly of non-official members, it is to be paid to the members of the Board and where the Medical Board consists partly of official members and partly of non-official members the fees payable to official members are to be credited to Government and the fee payable to non-official members are to be paid to such members. Revised rule 64(1 G) therefore provides accordingly.

(4) In sub-rule (h) at page 69 it is provided that a fee of Rs. 5/- shall be charged to the applicant for review of his case by the State Medical Board. From the scheme of the rule, it appears that it is the function of the State Medical Board to review any case which the Director desires to be reviewed. The case is not to be reviewed at the instance of an applicant. If so, it is not understood why a fee of Rs. 5/- should be charged to the applicant.

(5) It is necessary to substitute the words "The Medical Board of_____" for the words "The Superintendent of Excise, _____ District" occurring in form F.L./A-I as the application in the said form will now have first to be presented to the Medical Board and not to the Superintendent of Excise as contemplated in the original form. Theform F.L/A -1 has been further amended accordingly (vide clause 3(c) of the revised draft).

Sd/- J.R.Dhurandhar

O.C. 25/3

Additional Secretary to Government.

U.R. To R,D., No. 4577,,dated the26th March 1952

Mjr/26/6

4.Cs.

Legal Department.

As stated by the Director of Excise and Prohibition in his letter of 22nd January 1952, the object of amending the Bombay Rectified Spirit Rules as now proposed is to put restrictions on the manufacture of such medicinal and toilet preparations as are being used as substitutes for intoxicating drinks. But such restrictions, in view of the R.L.A.'s opinions already expressed and the joint opinion of the Advocate General and Shri Seervai dated 4.3.1952 would be unconstitutional. In the joint opinion the Advocate General and Shri Seervai agree with the R.L.A.'s opinion that the reasoning underlying the judgment of the Supreme court applies to the manufacture, import and export of ~~manufac~~ medicinal and toilet preparations as it does to the possession, sale, etc. of such preparations. What is, therefore, true in the case of restrictions on the possession, sale, etc., of medicinal and toilet preparations is also true in the case of restrictions on the manufacture of such preparations amendments as proposed are, therefore, invalid and should not be carried out. In the joint opinion of the Advocate General and Shri Seervai it is made clear that it would not be legal to regulate the manufacture, possession, etc. of such preparations and also to prevent their misuse. But the provision to that effect will have to be made in the Act itself and not by rules or orders. The Advocate General and Shri Seervai have already approved the draft amendments to the Act for the purpose. The question has been considered on several occasions by the R.L.A. and the Counsel who were consulted . No useful purpose will be served by raising the question over and over again.

Sd/- J.R.Dhurandhar

O.C. 9/4

Additional Secretary to Government.

U.R. to R.D., No. 5401, dated the 10th April 1952.

Mjr/26/6

4 Ca.

LEGAL DEPARTMENT

For the reasons stated in the Additional Secretary's opinion in the linked file* no rules can be made requiring permit for the purpose of importing into the State any spirituous medicinal preparations.

* U.R. to R.D. No. 5401 dt 10.4.52

Sd/- J.R.Dhurandhar

o.c. 9/4

Additional Secretary to Government.

U.R. to R.D. No. 5402, dated the 10th April 1952.

Mjr/26/6

4 Cs.

Legal Department.

Revised draft rules are sent herewith.

2. The proposed draft rules are virtually the rules subject to which Government proposes to remit the excise duty on medicinal and toilet preparations which are exported out of India. The power of such remission can be exercised by Government under section 107 read with the rule making power under section 143. Unless this point is made clear in the preamble, the rules are likely to be attacked on the ground that they are beyond the competence of Government. The preamble of the revised draft has, therefore, been amended accordingly.

Sd/- J.R.Dhurandhar

O.C. 13/6

Additional Secretary to Government

U.R. to R.D., No. 9981, dated the 14th June 1952.

Mjr/26/6

4 Cs.

Legal Department

A revised draft of the Bombay Higher Alcohol Rules and a revised draft of regulations are sent herewith.

2. The provisions of the proposed rule 25 have been inserted as proviso to rule 15 and to rule 18 of the revised draft Rules on the lines of the proviso to rules 17(1) and 19(1) of the Bombay Methyl Alcohol Rules, 1952 a draft of which was furnished to R.D. with L.D. No. 10441 dated 23-6-52. It is presumed that as pointed in the concluding portion of Additional Secretary's Opinion No . 1021 dated 22nd January 1952 the pass fee proposed to be levied is reasonavle.

3. In view of the amendments made in section 143 and 144 of the Bombay Prohibition Act, 1949 by the Bombay Prohibition (Amendment) Act, 1952, the Director of Excise is no longer empowered to prescribe fees payable in respect of any privilege, licence, pass or authorisation; but the same will have now to be prescribed by Government under section 143. The proposals made in the draft regulations at p 269 ante and p. 33 of R.D. file No. 8585/49 have, therefore, been incorporated in the revised draft rules 10, 15 and 19. The fee for grant of permit in Form H-A I will have also to be prescribed in rule 7. The amount of fee should therefore be specified in that rule before the notification is issued

Sd/- J.R.Dhurandhar

o.c. 8/11

Additional Secretary to Government.

U.R. to R.D. No. 18705/B, dated the10th November 1952.

Mjr/26/6

4 Cs.

The question raised by R.D. is whether the assessment fee, the pass (vend) fee and thespecial fee on foreign liquor can legally be levied without undertaking ligislation. The above fees were being levied under the provisions of the Bombay Abkari Act, 1878, since repealed and are being levied at present. Under the Bombay Abkari Act, 1878, vendor's licences for the sale of foreign liquor provided by clause 1-A that in addition to the licence fee to bepaid under chause 1, the licensee shall pay the fees in arrears assessed at the rates fixed by Government from time to time on the sales of liquor during each of the quarters. Rates of assessment fee fixed were set out in para. 162 of the Bombay Excise Manual Vol I Part III at p. 63. The said rates are revised in G.R.(R.D.) No 2843/49 dated 8th December 1949. Under the Bombay Abkari Act, section 30 provided for the payment of fees and the conditions on which a licence, permit or pass was to be granted under the Act. Clause 1-A of the licence which provided for the payment of the assessment fee stated that the said fees was to be assessed on the sales of liquor during each quarter. This fee was to be in addition to the licence fee specified in the preamble of the licence. In R.L.A's opinion No. 188-Confl. dated 20th February 1951 it was therefore held that the levy of the said fee amounted to a tax on the sales of liquor and it was suggested that the levy should be regularised by the amendment of the Bombay Prohibition Act, 1949.

2. The orders regarding the levy of the pass (vend) fee and the special fee are set out in paras . 49 to 52 of the Excise Manual Vol. I p. 209 to 212 . As stated in the letter of the Director of Prohibition (at p. 1 of the file) these fees are

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levied on the grant of a pass for the removal of foreign liquor and other spirits either from the Customs House or Station, across the customs boundary and from the distillery at Nasik. In substance they are really transport fees. The legality of the said fees was considered in 1940 and 1941 in R.L.A.'s opinions dated 26th July 1940 and No 98-L, dated 23rd October 1940 and No. 2228 dated 12th March 1941. It was then pointed out that as fees they would have to be reasonable in amount calculated on the cost of issuing the pass or some other similar consideration.

3. The opinions of R.L.A. in regard to the assessment fee, as well as the pass (vend) fee and the special fee are based on the principle that fees are distinguishable from taxes and the ruling element in the levy of the former is that they are payments or levies for services rendered, while in the case of taxes it is the revenues. The Advocates General (Shri Setalvad and Daphtary) have agreed with this view. In support of his view Shri Dapthary has referred to the decision of the Privy Council in Pazundaung v. Municipal Corporation of Rangoon L.R. 58 I.A. 313.

4. The Director of Prohibition in his letter (at p 1) takes exception to the above view on the following grounds:- (1) The principle laid down in the decision of the Privy Council is applicable only to a small class of licences the object of which is only the regulation of a purely supervising nature. (2) Where it is found necessary on the grounds of public policy to adopt a more restrictive type of regulation whereby the privilege of carrying on a trade or activity is to be confined to few indivuduals giving rise to a monopoly or

a quasi monopoly, it is legitimate for the State to claim for the public fisc a share of expected high profits or gains accruing to licensees. In support of this ground the Director relies on the analogy of mining, fishing and forest licences and contends that it is a long standing practice in the excise taxation to levy substantial licence fees for the privileges of vend, manufacture and import of intoxicating liquors. The Director also cites the practice in the Excise Department till recently followed of putting up for public auction licences for the sale of liquors.

The R.D. desires to ascertain whether on the above grounds the opinion given by the R.L.A. in regard to the assessment fee and pass (vend) fee requires reconsideration.

4. As regards the first ground, it appears that the view taken by the Director regarding the decision in Pazundaung's case is entirely wrong and untenable. That decision does not lay down any new principle which was unknown to the system of jurisprudence or even economics. The decision arose out of a case relating to the levy of licence fees by the Rangoon Municipal Corporation for the establishment of private markets in the City of Rangoon. The Municipal Corporation of Rangoon had changed licence fees on floor space basis. The fee charged was to the extent of Rs. 28,000 a year. Cunliffe J. of the Rangoon High Court holding that the levy of the said fee as licence fee was illegal observed as follows:-

> " Is there any difference in law between a tax and a license fee? In my opinion there is a difference. A tax is derived from a well defined power given to Parliament, or, in such cases, to public authorities, A license is merely a permission granted to a particular person to do a

> particular thing at a fixed place during a determinate period. The fee attached to such a permit is a specific sum of money to be collected from the licensee for the purpose of covering the expenses of the licence, its registration, inspection and supervision. Fees levied on licenses of premises outht not to be greater than a sum to cover the costs of the regulation. Revenues are raised by virtue of the taxing power, and the taxing power alone. What the American Corporation Lawyers call the police power cannot b e invoked or exercised as a general means of raising the revenue."

The above biew was upheld by the Appellate Branch of the Rangoon High Court (I.L.R. 5Ran 212) and confirmed by the Privy Council in 58 I.A. 313. To the same effect are the ~~remarks~~ remarks of the Taxation Inquiry Committee at Vol . I p 239: it is stated as follows:-

> " Fees are distinguished from taxes by the fact that, with fees, the ruling principle is special payment for special service, of special reckoning in each case between the treasury and the contributors: while, with taxes, the ruling principle is general contributions for the expense of maintaining order and promoting the welfare and culture of the people." *

See also Godadhar V Province of Orissa (1950) A.I.R. (Orissa) 47. It is true that in 1922 when the Government of India objected to the legality of the pass(vend) fee on foreign liquor, it was defended on the ground that its levy was justified by the provisions of the Bombay Abkari Act. But one of the grounds of objection urged by the Government of India was that fees could not be used for the purpose of deriving substantial revenue (see the Govt. of India's letter No. 3820 dated 29th June 1922. See also the Commerce Departments' note sent by Lord Reading with his letter dated 1st March 1923). This ground was considered by R.L.A. (Mr Wild) in his opinions No. 407 dated 1st March 1922 and No 110-p dated 16th July 1922 and No . 180 5 dated 19th September 1922. In the last of the opinions the said argument is sought to be replied on the ground that the particular method is

a question of detail. It will be remembered that at that time the distinction between taxes and fees had not been brough out under the Government of India Act of 1919, as it has been done under the later Constitution Acts of 1935 and 1950. Moreover , the real objection of the Government of India then was that the pass (vend) fee was an additional import duty or customs duty and as such was leviable by them.

6. It was in 1934 or 1935 that the real distinction between taxes and fees came to the forefront so far as the Province of Bombay was concerned. Until then it was the practice of the Government of Bombay to levy registration fee on motor vehicles as high as permissible for the purposes of revenue. Late Shri K.F. Nariman objected to pay the said fee and was prosecuted. The Presidency Magistrate made a reference to the High Court regarding the levy of the said fees. After consulting the Advocate General (Sir Kenneth Kemp) the Bombay Government withdrew the prosecution. In order to legalise the levy for the purpose of taxation, the Bombay Motor Vehicles Tax Act, 1935, was then passed. When the Constitutionof 1935 was drafted, in the three Lists in the Seventh Schedule to the Govt. of India Act, 1935, the distinction between taxes and fees was expressly recognised and incorporated. At the end of each of the three Lists an entry was inserted providing for the levy of fees in respect of each of the matters in the list except court fees. Lists I and II contain separate entries for taxes. Similar entries relating to fees and taxes are incorporated in the three Lists in the Seventh Schedule to the Constitution. Fees which were referred to in thethree Lists in the Seventh Schedule to the Govt. of India Act, 1935 as well as the present Constitution are entirely distinct from taxes and cannot have any meaning other than the ordinary

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meaning attached to the expression. They cannot mean levies or taxes intended for the realization of the revenues. Thus, court fees, though designated as fees, are really taxes leviable under item No. 3 in List II and not fees under item No 66 in that List. So far as intoxicants are concerned, the Constitution provides that under item No. 51 in List II duties of excise can be livied, In addition to these duties, taxes of the nature specified in the subsequent items ~~no doubt provid~~ In the said list can be levied but there being ~~List can be levidd~~. But those items no doubt provide for a tax on sales but none of the said items provides for a tax on removal or transport. Item No. 66 which relates to fees would no doubt justify the imposition of a fee on transport, but cannot justify the imposition of a tax for the purpose. The Bombay Prohibition Act, 1949, was passed when the Government of India Act, 1935, was in force. The reference to fees in Chapter VIII of that Act and in other provisions wouldnot have any meaning other than that the expression has in the Constitution. The first ground urged by the Director of Prohibition is entirely untenable and cannot be accepted.

6. In regard to the second ground also, it is clear that the Director's view is not correct. The licenence fees or levies in respect of mining rights, fisheries and forests are, as admitted by the Director himself, royalties and neither taxes nor fees (see Taxation Inquiry Committee's report Vol I, p 7). Minerals, fish and forest produce are a part of the State property and while granting licences or permission for their appropriation to a private individual, the State can legitimately charge for its share. In the grant of such licences, it is open to the State to create monopolies. It is pointed out by the Taxation Inquiry Committee at Vol. I. O 239,

that the system of auctioning shops for the sale of liquors stand on the same footing. As in the case of patents, the State has the right to control and regulate the manufacture and sale of liquors. But, as pointed out above, the assessment fee is levied in addition to thefee charged for permission to sell liquors and, as the express terms of clause 1-A of the licence shows, is in the nature of a tax on the sale of liquor. The State Government is competent to levy the same, but its levy will have to be regulated by a proper legislative measure. It should not be left to be levied by executive orders or under the conditions of a licence. Under section 147 of the Bombay Prohibition Act, 1949, the provisions of the said Act do not apply to import and export of intoxicants across the customs frontier. It is true that their transport, possession, etc., in the country can be regulated and controlled. Fees for regulating their removal from one place to another will have to be, as pointed out in H.L.A's opinions of 1940 and 1941, reasonable for such regulation and control. They cannot be levied for the purposes of revenue. The Second ground urged by the Director has also no substance.

Sd/- J.R.Dhurandhar

Additional Secretary to Government.

U.R. to R.D. No. 1021 dated the 22nd January 1952.

Mjr/26/6

5 Cs.

Legal Department.

The proposal in this case is that rules should be made for the control of the manufacture of vinegar. It is true that such rules exist in Madras andwere made in 1949, before the Prohibition litigation was fought out in Bombay. In that case the Supreme Court agreeing with the High Court held that it would not be within the scope of the Bombay Prohibition Act to impose restrictions on medicinal and toilet preparations, although such preparations may contain alcohol and may be misused. The Supreme Court in coming to that conclusion relied on the American Prohibition Act which exempts such preparation. The same consideration will apply to vinegar which by itself is not an intoxicating liquor and is not an article which ordinarily can be used as such. In American also it was held that the manufacture and sale of vinegar was not unlawfu, although alcohol is developed in the process of manufacture and although it could be used as an intoxicating liquor (Bramore on Prohibition p 579). It would not therefore be legal to make the proposed rules.

Sd/- J.R.Dhurandhar

O.C. 15/1

Additional Secretary to Government.

U.R. to R.D. No. 19078/B, dated the 15th November 1952.

Mjr/26/6

4 Cs.

CONFIDENTIAL

Legal Department.

Under section 24 of the Bombay Prohibition Act, as amended by the Bombay Prohibition (Amendment) Act, 1952, no person is to display any advertisement which solicits the use of any intoxicant. Under section 102 of the said Act, any publication whever printed or published containing any advertisements or matter soliciting the use of any intoxicant is liable to be forfeited to the State Government, and a police officer has been empowered thereunder to seize the same wherever found in the State. In view of these provisions of the Bombay Prohibition Act. the Public Relation Officer, Western Railways, may be advised not to accept any advertisement of Liquor Products for display at the railway stations.

Sd/- J.R.Dhurandhar

8/12

O.C.

Additional Secretary to Government.

Secretary, R.D.

Mjr/26/6

4 Cs.

Legal Department

A revised draft notification in placeof Revenue Departmant draft is sent herewith.

Rule 16B of the Revenue Department's draft makes it a condition precedent before an application under rule 16A is forwarded to the director, that the applicant should excute a bond in Form VII for Rs. 500/- for the proper observance of these rules etc. Under rule 6 of the Bombay Rectified Spirit Rule, 1950, a licencee is required to excute a bond for Rs. 1000/- for the proper observance of the provisions of the licence if the quantity of rectified spirit exceeds a gallon per month. Under the proviso to the said rule 6 it is however provided that the execution of such bond shall not be necessary if the rectified spirit is required on behalf of Government, Municipal or Local Board institutions, or Education al Institutions for teaching and research work if a written undertaking is given on behalf of such institutions for the proper observance of the provisions of the Act or r. les etc. It appears that the object of the draft rules is to issue rectified spirit to the educational institutions, as also to other persons required by them for any educational purpose free of excise duty. If the Government etc. institutions. and other educational institutions are already holding licence under the Rules without executing a bond under proviso to rule 6, it would be repugnant to the provisions of rule 6 (proviso) now to provide by a rule to make such institutions to execute a bond. Provisions is therefore. necessary for taking a bond from persons other than Government and other educational institutions under a rule. The rule has therefore been amended accordingly.

The Revenue Department draft rule 160 seeks to prescribe the form of order of exemption to be passed

by the Director under section 107 of the Act. The power to exempt any person from payment of duty vests in the Director under section 107. It would not therefore be legally feasible for Government to prescribe the form of Order under section 107 by means of rules made under section 143 of the Act. The rule 160 therefore provides that the Director may grant such exemption by issuing an Order in that behalf. Form RS VIII has been deleted from the revised draft. A revised draft of the Order of Exemption to be issued by the Director is, however, sent herewith.

Sd/- J.R.Dhurandhar
17/11

o.c.

Additional Secretary to Government.

U.R. to R.D. No. 19120/B dated 17th November 1952.

Mjr/20/6

4 Cz.